STATE OF MICHIGAN

COURT OF APPEALS

ERIKA RODWELL, Personal Representative of the Estate of ERYCK FOSSETT, Plaintiff-Appellant, v TED FORREST, MARGARET WARNER, and DEPARTMENT OF HUMAN SERVICES, d/b/a WAYNE COUNTY CHILD PROTECTIVE SERVICES, Defendants-Appellees.	UNPUBLISHED May 25, 2010 No. 289038 Court of Claims LC No. 08-000074-MM

Before: DAVIS, P.J., AND DONOFRIO AND STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right from a Court of Claims order granting defendants summary disposition in this alleged constitutional tort claim arising from defendants' alleged failure to investigate and report suspect child abuse and failure to take action to protect the decedent from his father. The trial court dismissed plaintiff's action for failure to comply with the statutory notice requirements in MCL 600.6431(1) and (3). Because the trial court erred with it failed to determine whether plaintiff's claim as pleaded in her complaint, and as supported by the record, qualifies as a constitutional tort under Michigan law, we reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff and Carlee Hines are the parents of the decedent, Eryck Fossett, born May 11, 2005. Plaintiff left Fossett in the care of Hines at his mother's home while she worked. Plaintiff alleges in her complaint that when she picked Fossett up on November 10, 2005, he was "severely battered on his face and head." Plaintiff states in her complaint that she took him to the hospital on that same date and the physicians reported the suspected child abuse to Wayne County Child Protective Services (CPS) by phone and by writing on that date as well. Plaintiff alleges in her complaint that the report was received and assigned to CPS employee Shunya Cleveland on or about November 10, 2005. On January 10, 2006, Fossett was "beaten to death" in his father's home.

Plaintiff alleges that under CPS's administrative rules and services manual, the CPS investigation was required to commence within 24 hours and be complete within 30 days, but "[a]s a matter of longstanding official custom, policy or practice, Wayne County CPS

investigators did not abide by the investigative requirements of the Michigan Child Protection Act, or their own administrative policies . . . ." Plaintiff alleges in her complaint that Cleveland did not begin her investigation until January 10, 2006, the date Fossett died and the date his death was reported to CPS. Plaintiff further alleges in her complaint that Cleveland tried to coerce plaintiff and her mother into cooperating with Cleveland's plan to make the situation appear as though she had commenced the investigation sooner. Plaintiff alleged that she and her mother believed Cleveland was trying to intimidate them and instead of complying, they reported Cleveland's conduct to CPS supervisors and others.

A letter dated June 15, 2006, from Stacie Bowens and Longino Gonzales, both of the Michigan Department of Human Services (DHS) Field Services Administration indicated that DHS was "in the process of reviewing the handling of the 2005 and 2006 Child Protective Services (CPS) complaints concerning [Erika Rodwell] by Western Wayne Child & Family Services (CFS)." A second letter in the record, dated July 17, 2007, from Verlie M. Ruffin, Director of the Michigan Office of Children's Ombudsman (OCO), stated that the OCO had investigated the complaint and found numerous violations. While the OCO letter is partially redacted, several findings are still included in the letter. Among other findings, OCO found that CPS, "failed to properly investigate the allegations contained in the complaint," "did not assess the immediate safety needs of the child," "did not complete collateral contacts or interviews," and did not complete their investigation "within 30 days as required by law and policy." OCO also found that "CPS supervision in this case was ineffective," and that "there was insufficient evidence documented by Wayne County CPS" regarding the complaint investigation that occurred after the incident.

Plaintiff filed her complaint on July 16, 2008,[1] alleging only one count entitled "Michigan Constitutional Tort Claim as Against All Defendants." On August 26, 2008, defendants moved for summary disposition pursuant to MCR 2.116(C)(4), (7), and (8) presenting several arguments. Defendants argued that plaintiff's claims were barred by sovereign immunity; constitutional tort claims have not been recognized to exist in Michigan; even when assuming for the sake of argument that constitutional tort claims do exist in Michigan, they could not extend to individual employees; the Court of Claims lacked jurisdiction over plaintiff's claim because defendants Forrest and Warner are not executive officers of a state department, and finally, plaintiff's claim is barred by MCL 600.6431[2] because plaintiff failed to file a notice of

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[1] The complaint is dated May 16, 2008, but the lower court docket sheet indicates that it was not filed until July 16, 2008. The trial court's opinion and order incorrectly refers to May 16, 2008.

[2] In pertinent part, the Court of Claims Act, MCL 600.6431(1) and (3), provide:

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in

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intention to file a claim or file a claim against the State within six months of the event giving rise to the lawsuit.

The trial court entertained oral argument on defendants' summary disposition motion on October 15, 2008. The arguments focused on whether constitutional tort claims have been recognized to exist in Michigan and if so, whether plaintiff's claim qualified as one, and further, whether the Court of Claims was the proper venue to hear plaintiff's claim. On October 20, 2008, the trial court issued a written opinion and order granting summary disposition to defendants finding that the claim accrued, at the latest, on January 10, 2006 and that under MCL 600.6431(1), plaintiff was required to have provided notice of her intention to file a claim by January 10, 2007, but there was no indication that any notice was provided before the filing of the action in 2008 relying on *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197; 731 NW2d 41 (2007).

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). After reviewing the pleadings, we conclude that the trial court erred when it ruled that plaintiff's claim failed strictly on procedural grounds pursuant to MCL 600.6431(1) and (3) without first making any legal determination regarding whether plaintiff's claim constituted a viable constitutional tort.

Clearly, plaintiff alleged a constitutional tort in her complaint. This Court recently explained that, "[t]ypically, a constitutional tort claim arises when a governmental employee, exercising discretionary powers, violates constitutional rights personal to a plaintiff." *Duncan v State*, 284 Mich App 246, 270; 774 NW2d 89 (2009), lv gtd ___ Mich ___ (2009). We do recognize that a question may exist regarding whether constitutional torts represent genuine causes of action in Michigan. Our Supreme Court has been equivocal on the subject, stating that a "claim for damages against the state arising from violation by the state of the Michigan Constitution *may* be recognized in appropriate cases." *Smith v Dept of Public Health*, 428 Mich 540, 544; 410 NW2d 749 (1987), aff'd sub nom *Will v Michigan Dept of State Police*, 491 US 58; 109 S Ct 2304; 105 L Ed 2d 45 (1989) (emphasis added).[3]

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> detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
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> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

[3] The only majority opinion in *Smith* is contained in the memorandum opinion summarizing the holdings on which at least four justices agreed. See *Lewis v State of Michigan*, 464 Mich 781, 786; 629 NW2d 868 (2001).

Plaintiff's constitutional tort claim allegations are set out specifically in paragraph nine of her complaint, as follows: "Each of the CPS Defendants acted in bad faith, recklessly in violation of, and otherwise with deliberate indifference of, the Plaintiff's clearly established statutory and constitutional due process rights to protection from further child abuse and neglect." When defendants moved for summary disposition they characterized plaintiff's claim as a "'Michigan Constitutional Tort Claim' based upon an alleged substantive due process violation." Even in its own opinion and order, the trial court seemed to recognize that plaintiff pleaded a constitutional tort in her complaint when she alleged "violations of the Michigan Child Protection Act and the Michigan Constitution by Defendants relating to deprivations of substantive due process rights for actions they took in their official capacities and under the color of law."

Despite the trial court's obvious acknowledgement of the bases for plaintiff's claim, the trial court chose not to determine whether plaintiff's claim as pleaded in her complaint, and as supported by the record, qualifies as a viable constitutional tort under Michigan law.[4] Instead, the trial court imposed on plaintiff's claim the Court of Claims notice requirement found in MCL 600.6431(1) and (3), as well as the dictates of our Supreme Court in *Rowland* that involved the application of MCL 691.1401(1) which is a notice provision applicable to the defective highway exception to governmental immunity. This was error.

Plaintiff alleges in her complaint a constitutional tort as opposed to a tort liability action to which the state may enjoy either statutory or common-law immunity. See *Smith*, 428 Mich at 640-642 (BOYLE, J.). With regard to tort liability actions, as a general rule, a governmental agency is immune from tort liability when it is "engaged in the exercise or discharge of a governmental function." *Rowland*, 477 Mich 202; MCL 691.1407(1).[5] The governmental tort

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[4] On remand, it may be helpful for the trial court to utilize Justice Boyle's analysis in *Smith*, *supra*, when determining whether plaintiff's claim as pleaded in her complaint, and as supported by the record, qualifies as a viable constitutional tort under Michigan law. Justice Boyle's analysis in *Smith*, *supra*, has generally required that a plaintiff must establish a state custom or policy mandating an employee's action to be actionable. *Reid v State of Michigan*, 239 Mich App 621, 628-629; 609 NW2d 215 (2000); *Carlton v Dep't of Corrections*, 215 Mich App 490, 504-505; 546 NW2d 671 (1996). The execution of the policy or custom must cause a person to be deprived of constitutional rights. *Id*. at 505. It is necessary to consider both the custom or policy involved and the constitutional rights affected by the execution of the custom or policy in determining whether plaintiff's claim is actionable.

[5] Tort immunity is granted to governmental agencies in MCL 691.1407(1), which provides:

> Except as otherwise provided in this act, a governmental agency is immune from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function. Except as otherwise provided in this act, this act does not modify or restrict the immunity of the state from tort liability as it existed before July 1, 1965, which immunity is affirmed.

liability act (GTLA), MCL 691.1401 *et seq*., broadly shields a governmental agency from tort liability and enumerates several narrowly drawn exceptions to governmental immunity. *Id*. at 202-204. The Michigan Supreme Court has held that the Legislature is within its authority to structure governmental immunity solely as it deems appropriate. *Mack v City of Detroit*, 467 Mich 186, 202; 649 NW2d 47 (2002). Further, in *Rowland, supra*, our Supreme Court clearly advised that, because the Legislature is not required to provide exceptions to governmental immunity, it has the authority to allow such suits only on compliance with "rational notice limits." *Rowland, supra* at 212.

But plaintiff in the instant case did not bring a tort liability claim. She alleged a constitutional tort. A constitutional tort "arises from violation of a constitutionally protected right by the government," and because the constitution limits the government's power instead of vice versa, the "primacy of the constitution must eclipse the power of immunity to countenance constitutional violations by the state without concomitant liability." *Smith, supra*, 428 Mich at 640, 643-644 (BOYLE, J.). Stated another way, because the constitution is preeminent, statutory immunity does not bar recovery for violations of the state constitution perpetrated by custom or policy. *Smith*, 428 Mich 544, 641; *Burdette v State*, 166 Mich App 406, 408; 421 NW2d 185 (1988). In *Burdette*, this Court observed,

> Governmental immunity is not available in a state court action where it is alleged that the state has violated a right conferred by the Michigan Constitution. *Smith v Dep't of Public Health*, 428 Mich 540; 410 NW2d 749 (1987). Plaintiffs' claim alleged that defendant violated plaintiffs' due process rights under Const 1963, art 1, § 17. Plaintiffs have stated a prima facie claim. Under *Smith*, defendant cannot claim immunity where the plaintiff alleges that defendant has violated its own constitution. Constitutional rights serve to restrict government conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional restrictions. [*Burdette*, 166 Mich App 408-409.]

Plaintiff's alleged constitutional tort claim is derived directly from constitutional protections and unlike a tort liability claim does not fall under the purview of the GTLA and does not rely on any enumerated exception to governmental immunity as enacted by the Legislature and structured by the Legislature's own discretionary authority. *Mack*, 467 Mich 202. The state's liability for a constitutional tort is not something that the state affirmatively grants in the form of a statute with which a plaintiff must comply. See generally *Smith*, 428 Mich 544, 641; *Burdette*, 166 Mich App 408. Rather, liability for a constitutional tort is simply inherent in the fact that the state is subject to the constitution as the preeminent law of the land. Because *Rowland* concerned the application of governmental immunity to a tort liability claim, which is not at all at issue in this instant case, we conclude that plaintiff's alleged constitutional tort claim is not subject to our Supreme Court's dictates in *Rowland*. *Rowland, supra* at 212.

In the same vein, we are well aware that *Rowland* abrogated prior case law holding that notice provisions cannot be constitutionally imposed in the absence of prejudice. *Rowland*, 447 Mich 213-214. Crucially, though, *Rowland* did so on the basis of exceptions to governmental immunity; specifically, the state's discretionary authority to allow or disallow tort liability claims by virtue of the application of governmental immunity. *Id*., 212; see also *Mack*, 467 Mich 202. Here, plaintiff's alleged constitutional tort claim is of drastically different sort than those tort

liability claims subject to governmental immunity addressed in *Rowland*. Therefore, we see no reason for the trial court in this case—if it finds that plaintiff's alleged constitutional tort is a valid one—to extend the holding in *Rowland* regarding the application of statutory notice requirements to constitutional torts to this case. Instead, it should apply the pre-*Rowland* case law where prejudice is still required.

We reverse the trial court's grant of summary disposition in favor of defendants and remand for further proceedings consistent with this opinion.

Reversed and remanded. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Alton T. Davis
/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens